

78-1223

FILED

JAN 25 1979

MICHAEL RODAK, JR., CLERK

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1978

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No. [REDACTED]

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MAURICE SMITH, LAWRENCE BLACKWELL, J. C. PATTERSON, GEORGE KELL, Individually and as Commissioners of the Arkansas State Highway Commission; and HENRY GRAY, Individually and as Director of the Arkansas State Highway Department,  
Petitioners,

vs.

ARKANSAS STATE HIGHWAY EMPLOYEES, LOCAL 1315, JAMES P. ROWELL, ROBERT C. CONLEY, JACK FRANKS, EDWIN SHINN, SPENCER Y. LAND, WALTER MAYS, ROBERT WATSON and A. D. TATE,  
Respondents.

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**PETITION FOR A WRIT OF CERTIORARI**

**To the United States Court of Appeals  
for the Eighth Circuit**

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1978

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No. 78-1188

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MAURICE SMITH, LAWRENCE BLACKWELL, J. C. PATTERSON, GEORGE KELL, Individually and as Commissioners of the Arkansas State Highway Commission; and HENRY GRAY, Individually and as Director of the Arkansas State Highway Department,  
Petitioners,

vs.

ARKANSAS STATE HIGHWAY EMPLOYEES, LOCAL 1315, JAMES P. ROWELL, ROBERT C. CONLEY, JACK FRANKS, EDWIN SHINN, SPENCER Y. LAND, WALTER MAYS, ROBERT WATSON and A. D. TATE,  
Respondents.

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**PETITION FOR A WRIT OF CERTIORARI**

To the United States Court of Appeals

for the Eighth Circuit

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The Petitioners Maurice Smith, Lawrence Blackwell, J. C. Patterson, George Kell, Individually and as Commissioners of the Arkansas State Highway Commission and Henry Gray, Individually and as Director of the Arkansas State Highway Commission respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals of the Eighth Circuit entered in this proceeding on October 10, 1978.



### **OPINION BELOW**

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion, order and memorandum opinion by the United States District Court, Eastern District of Arkansas appears in the Appendix hereto.

### **JURISDICTION**

The judgment of the Court of Appeals for the Eighth Circuit was entered on October 10, 1978. A timely petition for rehearing *en banc* was denied on November 7, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

### **QUESTION PRESENTED**

Whether the Union and public employees who have designated the Union as their agent are deprived of constitutional rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment due to the fact that the Arkansas State Highway Department has refused to recognize the Union to the extent that the Union be allowed to process grievances to the second step.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### **United States Constitution, Amendment I:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or

abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### **United States Constitution, Amendment XIV, Section 1:**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### **United States Code, Title 42:**

#### **Section 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

### **STATEMENT OF THE CASE**

This action was commenced by Arkansas State Highway Department Employees, Local 1315, hereinafter "Union", and eight individual employees of the Arkansas State Highway Department, including plaintiff Robert Watson. Jurisdiction was based on 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. The Union and the individual employees thereafter dismissed all



the counts of their Complaint except Count I. Count I of the Complaint was submitted to the District Court, the Honorable Jerald W. Heaney, U.S. District Judge, sitting by designation, on the Union and Employee's Motion for Summary Judgment and the Cross-Motion for Summary Judgment of Maurice Smith, Lawrence Blackwell, J. C. Patterson, and George Kell, individually and as Commissioners of the Arkansas Highway Commission and Henry Gray, individually and as Director of the Arkansas State Highway Department. Hereinafter the Commissioners will be referred to as "Commissioners" and Mr. Henry Gray will be referred to as "Director".

There was no substantial dispute as to the facts. Robert Watson, an employee of the Arkansas Highway Department, was discharged by the Highway Commission and W. E. Hughes, an employee of the Arkansas Highway Department, was temporarily suspended without pay for five days. Each of the employees initiated grievance proceedings with the Arkansas State Highway Department and contacted the Union to represent them. The Commission required each man to file his own complaint at the stage in the grievance proceedings when a written complaint was required. The Union appeared in behalf of each of the employees at the hearing. The Union and the employees filed their complaint in the District Court alleging, insofar as is relevant, that the grievance procedure was unconstitutional because it deprives the Union of the right to petition government for the redress of grievances in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and of the First Amendment to the Constitution of the United States. The District Court granted the Union's Motion for Summary Judgment in part. Specifically, the District Court held that the grievance procedure promulgated by the Commission on May 23, 1973, is unconstitutional insofar as it prohibits the Union from forwarding a Step 2 written complaint prepared by the employee

to an authorized employee representative. The District Court denied the remainder of the Union's Motion for Summary Judgment. The District Court granted the Motion for Summary Judgment of the Commission and Director as to the remaining portions of the grievance procedure holding them constitutional insofar as the Union was prohibited from being present at every stage of the grievance procedure. The Commission was directed to receive Step 2 written complaints from the Union on behalf of employee Robert Watson and employee W. E. Hughes.

Jurisdiction in the United States Court of Appeals for the Eighth Circuit was based on 28 U.S.C. § 1291 and Rules 3 and 4 of F.R.A.P. 28 U.S.C.A. On Appeal to the United States Court of Appeals for the Eighth Circuit, the judgment was confirmed in a Per Curiam Opinion which relied on *United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. 217 (1967). Rehearing *en banc* was denied.



## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled by This Court.

Step 2 of the subject grievance procedure provides the following:

"2. If a settlement is not reached with the supervisor, the employee should submit his complaint in writing to the appropriate Arkansas State Highway Department Employer Representative.

For the purpose of dealing with complaints regarding working conditions, the Arkansas State Highway Department Maintenance Engineer is hereby designated as Employer Representative.

For the purpose of handling questions as to wages and hours of ASHD employees, the Arkansas State Highway Department Personnel Officer is hereby designated Employer Representative.

Agents representing Arkansas State Highway Department employees are required to deal exclusively with the designated Employer Representative in the presentation of employee grievances."

The procedure merely provides that the employee submit his complaint in writing to the employer representative. The procedure does not require that it be written by the employee. His union representative, his lawyer or any person of his choosing may draft the complaint. The employee is not deprived of the services or representation of his union or any other representative. The constitutional violation, if any, is an extremely narrow one, actually to the point of being de minimus.

The Court must assume that good and valid reasons exist for Petitioners' insistence that the complaint or grievance be processed solely by the employee. It is obviously important to Petitioners to make certain that it is the employee who desires to carry his complaint or grievance to the next step and not his union.

Courts have consistently refused to define the manner and extent to which public officials must deal with grievances of public employees. *Hanover Tp. Fed. of Teach. L. 1954 v. Hanover Com. Sch. Corp.*, 457 F.2d 456 (7th Cir., 1972). Nor is the federal court "the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood*, 425 U.S. 341 (1976). The procedure promulgated by the Commissioners provided all employees the opportunity to be heard with the assistance of an agent of their choosing at a meaningful time and in a meaningful manner. *Norton v. Blaylock*, 409 F.2d 772 (8th Cir 1969).

The Court below concluded that the right to join a union encompasses the right of a union to file a grievance on behalf of its members and assist a member in making a presentation of that grievance. We respectfully disagree and point out that none of the decisions cited by the Court support that conclusion. If the Union is allowed to present a grievance at step two, or at any particular step for that matter, and is also allowed to assist the member in making a presentation of that grievance, the Commission would in effect be recognizing the Union as the bargaining agent for that employee. The Union would thus be accomplishing indirectly what it is prohibited from doing directly. The Commission would in effect be negotiating with the Union regarding the employee's wages, hours and working conditions.

Although public employees are not covered by the National Labor Relations Act, the instant decision, if allowed to stand,



would give public employees more rights than those afforded by the Act. Under the Act, unless a union gains majority status, an employer is not obligated to deal with it in any manner. If the instant decision is allowed to stand, any public agency will be forced to deal with the complaints of its employees through a labor organization. In the private sector freedom of association does not require an employer to allow a union to file and process grievances. Why then should public agencies be treated differently? It is a legislative problem—not one for the courts.

So then, as was said by Chief Justice Warren in *United States v. Robel*, 389 U.S. 258 (1967), it is not so much a question of balancing the interest of the state against the First Amendment rights of a citizen, but that individual rights be accommodated by "legislation drawn more narrowly to avoid the conflict."

## **II. The Decision Below Conflicts With the Decision of the United States Court of Appeals for the Seventh Circuit on the Same Manner.**

The instant decision conflicts with *Hanover Tp. Fed. of Teach. L. v. Hanover Com. Sch. Corp.*, 457 F.2d 456 (7th Cir., 1972). In that case the Court found that no constitutional duty to bargain collectively with an exclusive bargaining agent existed because the duty, when imposed, is imposed only by statute. Nevertheless, certain union activities are protected and they include advocacy and persuasion in both organizing the union and enlarging its membership and also the union's expression of its views to employees and to the public. Accordingly, a state may not "broadly condemn all union activities or discharge its employees simply because they join a union or participate in its activities. It does not follow, however, that all activities of a union or its members are constitutionally pro-

tected." Continuing, the Court stated that while economic activities of a group of persons who associate together to achieve a common purpose are not protected by the First Amendment, such activities may be either prohibited or protected as a matter of legislative policy. Based upon the facts presented in that case, the defendants' actions would have been an unfair labor practice if the National Labor Relations Act had been applicable because they tended to undermine the union's economic strength and deprived the employees of benefits they sought to obtain by exercising their rights of free speech and assembly. Most importantly, however, the Court held that the First Amendment provides no guarantee that a speech will persuade or that advocacy will be effective. "Since the coverage of the relevant parts of the Civil Rights Acts is no broader than the constitutional protection, those statutes are not equivalent to the Labor-Management Relations Act in the field of public employment."

The instant decision also conflicts with the recent ruling of this Court in *City of Charlotte v. Local 66*, 426 U.S. 283 (1976). That case held that the City's practice of withholding some amounts from employees' paychecks while refusing to check off fire fighter's union dues must meet only a relatively relaxed standard of reasonableness in order to survive constitutional scrutiny since the Court would reject any contention that the respondents' status of union members entitled them to special treatment under the Equal Protection Clause.



**CONCLUSION**

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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By BILL S. CLARK  
Attorneys for Petitioners

**APPENDIX**



**APPENDIX I**

United States Court of Appeals  
For the Eighth Circuit

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No. 78-1188

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Arkansas State Highway Employees  
Local 1315, James P. Rowell,  
Robert C. Conley, Jake Franks,  
Edwin Shinn, Spencer Y. Land,  
Walter Mays, Robert Watson and  
A. D. Tate,

Appellees,

v.

Maurice Smith, Lawrence Black-  
well, J. C. Patterson, George Kell  
and James A. Branyan, Indi-  
vidually and as Commissioners  
of the Arkansas State Highway  
Commission, and Henry Gray, In-  
dividually and as Director of the  
Arkansas State Highway Depart-  
ment,

Appellants.

Appeal from the United  
States District Court for  
the Eastern District of  
Arkansas.

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Submitted: September 14, 1978

Filed: October 10, 1978

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Before LAY, BRIGHT and ROSS, Circuit Judges.

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PER CURIAM.

The Arkansas State Highway Employees Local 1315, and eight individual employees of the Arkansas State Highway Department instituted this action for declaratory and injunctive relief under 42 U.S.C. § 1983 against Maurice Smith, Lawrence Blackwell, J. C. Patterson, George Kell and James A. Branyan, individually and as Commissioners of the Arkansas State Highway Commission, and Henry Gray, individually and as Director of the Arkansas State Highway Department. The complaint alleged, *inter alia*, that the refusal of the Commission and the Department to allow Local 1315 to file or initiate grievances on behalf of its members deprived Local 1315 of its right to petition government for the redress of grievances in violation of the First Amendment to the Constitution of the United States.

The circumstances leading up to the present litigation concern Robert Watson and W. E. Hughes, employees of the Arkansas State Highway Department. Watson was discharged by the Department and Hughes was suspended without pay for five days. Following unsuccessful discussions with their supervisors, each employee sent a letter to Local 1315, explaining the nature of their grievance and requesting the union to process the grievances on their behalf. In each case the union forwarded the employee's letter to the designated employer's representative and included its own letter stating that it represented the employees and decided to set up a meeting. The employer's representative did not respond to the union's letter. Thereafter each employee filed a written complaint directly with the employer representative. Local 1315 represented each employee at subsequent meetings with the employer representative. Watson was notified later that his discharge was justified, while Hughes was advised that his grievance would remain under advisement pending this action.

On cross-motions for summary judgment the district court found that under the grievance procedure the Commission will

not consider a grievance unless the employee submits his written complaint directly to the designated employer representative. Relying principally on *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967), the district court concluded that that portion of the grievance procedure was unconstitutional because it prevents Local 1315 from filing a grievance on behalf of its members.

We agree and affirm the judgment of the district court on the basis of its opinion.

Plaintiffs' counsel is awarded a \$300.00 attorney fee on this appeal.

It is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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**APPENDIX II**

United States Court of Appeals  
for the Eighth Circuit

78-1188

September Term, 1978

Arkansas State Highway Employees  
Local 1315, et al.,

vs.

Maurice Smith, et al.,

Appellees,

Appellants.

Appeal from the  
United States District  
Court for the Eastern  
District of Arkansas.

The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

November 7, 1978

**APPENDIX III**

**Memorandum Opinion**

(Filed in U. S. District Court January 23, 1978)

The parties are before the Court on cross-motions for summary judgment. Plaintiffs seek declaratory and injunctive relief under 42 U.S.C. §1983. As there are no material facts in dispute the sole issue for determination is whether the grievance procedure established by the Arkansas State Highway Commission deprives Arkansas State Highway Employees Local 1315 of the right to petition government for the redress of grievances in violation of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment.<sup>1</sup>

The grievance procedure, adopted by the Commission on May 23, 1973, provides:

1. The employee with a complaint or grievance will take this matter up first with his supervisor. (Supervisor in this sense means the person who usually gives the orders directly. His title may be squad boss, lead man, foreman, etc.) It is the duty of the supervisor to give an impartial hearing, make a thorough investigation and, if possible, make a decision which is mutually agreeable. The supervisor may keep a brief informal record of the matter for his own information and for reference later if the grievance is taken to the Employer Representative.

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<sup>1</sup> The complaint also alleged that certain plaintiffs were discharged, demoted, or not promoted because of their union activity in violation of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment. After a pre-trial conference the plaintiffs moved to dismiss these counts with prejudice. The Court granted the motion by an order dated October 19, 1977.



2. If a settlement is not reached with the supervisor, the employee should submit his complaint in writing to the appropriate Arkansas State Highway Department Employer Representative.

For the purpose of dealing with complaints regarding working conditions, the Arkansas State Highway Department Maintenance Engineer is hereby designated as Employer Representative.

For the purpose of handling questions as to wages and hours of ASHD employees, the Arkansas State Highway Department Personnel Officer is hereby designated Employer Representative.

Agents representing Arkansas State Highway Department employees are required to deal exclusively with the designated Employer Representative in the presentation of employee grievances.

3. The Employer Representatives will immediately review all the evidence available to them and if indicated, make further investigation into the matter. After all of the facts have been considered, a written report will be made to the Director. The decision of the Director as to the matters under consideration shall be final. The employee will then be notified in writing of the decision.<sup>2</sup>

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<sup>2</sup> On June 25, 1975, the Highway Commission adopted a new grievance procedure substantially identical to the old grievance procedure. An intermediate step was inserted that requires the employee to discuss his grievance with the District Engineer or Division Head, if he is dissatisfied with the supervisor's decision, before going to the employer representative. The new procedure requires the employee's written complaint to the employer representative to contain the nature of the grievance, the date the grievance arose, the name of the employees involved, the relief requested, and other matters the employee feels are pertinent. The District Engineer or Division Head must assist the employee in preparing the complaint and, after the employee signs the complaint, must forward it to the employer representative. Certain time limits are also specified.

The grievance procedure is said to be constitutionally deficient because Local 1315 is not permitted to file a step two written complaint on behalf of a member with the employer representative and cannot effectively process a grievance insofar as it cannot be present at either the first or third steps of the procedure. In particular, Local 1315 complains that it was not permitted to file the step two written grievances of Robert Watson and W. E. Hughes.

Robert Watson was discharged by the Highway Commission. He discussed the matter with his supervisor and the supervisor refused to reinstate him. Watson prepared a letter setting out the nature and relevant details of his grievance including a request to Local 1315 to file and process the grievance in his behalf with the employer representative. This letter was sent to Local 1315.

Local 1315 forwarded Watson's letter to the appropriate employer representative and included its own letter stating that it represented Watson and desired to set up a meeting. The employer representative did not answer Local 1315. Instead, the employer representative sent Watson a copy of the grievance procedure.

As Local 1315 did not receive an answer from the employer representative it sent a letter to the director explaining the situation and demanding that he order the employer representative to grant a meeting. Local 1315 was advised by the director that forwarding an employee's step two written complaint to the employer representative was an improper procedure. The employee was required to submit his step two written complaint directly to the employer representative. Watson subsequently submitted his step two written complaint directly to the employer representative.

A meeting was held in which Local 1315 represented Watson. Watson was later notified in writing that his grievance had



been carefully considered, but it had been determined that the discharge was justified.

W. E. Hughes was temporarily suspended without pay by the Highway Commission. After filing a grievance under the grievance procedure existing prior to May 23, 1973, the director by letter informed Hughes that a new grievance procedure existed and Hughes must follow it. In accordance with the grievance procedure, Hughes discussed the matter with his supervisor. Hughes was dissatisfied with the supervisor's decision. Hughes then wrote a letter to Local 1315 explaining the nature of his grievance and requesting Local 1315 to file and process the grievance on his behalf with the employer representative.

Local 1315 forwarded Hughes' letter to the employer representative with its own letter stating that it wanted to discuss the matter. The employer representative did not answer Local 1315. The employer representative, however, did contact Hughes and suggest a meeting date. Hughes filed his step two written complaint directly with the employer representative on the same day as the meeting. At the meeting Local 1315 represented Hughes and Hughes' grievance was discussed. Hughes was later notified that his grievance would remain under advisement until the pending legal action was decided.

It is clear from the above that under the grievance procedure promulgated by the Highway Commission, the Highway Commission will not consider an employee's grievance unless the employee submits his step two written complaint directly to the employer representative.

Freedom of association protects the right of public employees to join a union. *Thomas v. Collins*, 323 U.S. 516, 532 (1945); *Norbeck v. Davenport Community Sch. Dist.*, 545 F.2d 63, 67 (8th Cir. 1976), *cert. denied*, 431 U.S. 917 (1977); *American Federation of State, Co., & Mun. Emp. v. Woodward*, 406 F.2d

137 (8th Cir. 1969). This right includes more than passive membership. It includes the public employee's right to advocate the union's views and the union's right to engage in advocacy on behalf of its members. *Hanover Tp. Fed. of Teach. L. 1954 v. Hanover Com. Sch. Corp.*, 457 F.2d 456, 459-460 (7th Cir. 1972); *American Federation of State, Co., & Mun. Emp. v. Woodward*, *supra* at 139. It encompasses the right of a union to file a grievance on behalf of its members and assist a member in making a presentation of that grievance. *Cf. United Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217 (1967); *Brotherhood of R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *Parsons v. Carmichael*, 82 LRRM 2513 (E.D. Ark. 1972); *City of Fort Smith v. Arkansas State Council No. 38*, 245 Ark. 409, 433 S.W.2d 153 (1968). This right is one aspect of a public employee's right to petition government for the redress of grievances. *See United Mine Workers v. Illinois Bar Ass'n.*, *supra* at 222.

The Court must first consider whether the grievance procedure is unconstitutional insofar as it prohibits Local 1315 from forwarding a step two written complaint prepared by the employee to the employer representative. The Court concludes that it is since it prevents a union from filing a grievance on behalf of its members. Thus, the Highway Commission erred in refusing to accept the step two written complaints filed by Local 1315 on behalf of Watson and Hughes.<sup>3</sup>

The Court next considers whether the grievance procedure is unconstitutional insofar as it prohibits Local 1315 from being present at each step of the grievance procedure.

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<sup>3</sup> This does not prevent the Highway Commission from prescribing reasonable regulations regarding the contents of a complaint such as required under the new grievance procedure. The Court notes that nothing in the new grievance procedure prohibits Local 1315 from assisting the employee in the preparation of the complaint.



Local 1315 argues that the freedom to petition the government for the redress of grievances mandates its presence at each step of the procedure, relying by analogy to the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* Although § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) requires that the union be given the opportunity to be present at a grievance proceeding, this is not, as plaintiffs argue, dispositive of the issue before the Court. The National Labor Relations Act and § 1983 are not coextensive in the public employment field.<sup>4</sup> *Hanover Tp. Fed. of Teach. L. 1954 v. Hanover Com. Sch. Corp.*, *supra* at 461.

What is critical is that the grievance procedure provides the employees with the opportunity to present their grievances with assistance by the union at a meaningful time and in a meaningful manner. See *Norton v. Blaylock*, 409 F.2d 772 (8th Cir. 1969). The grievance procedure did give the employee and the union this opportunity. The union represented both Watson and Hughes at the meetings with the employer representative. At the meetings the union could supplement the investigation undertaken by the supervisor and conduct its own presentation. Moreover, the union was free to communicate with the Highway Commission about the grievance at any step in the procedure, although it was unable to be present at every step. Thus, the union was not deprived of its right to petition government for the redress of grievances because it was unable to be present at each step of the grievance procedure.

In view of the prior discussion it follows that plaintiffs' motion for summary judgment will be granted in part and denied in part; the cross-motion of the defendants will be granted in

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<sup>4</sup> Neither does the fact that Title VII allows a union to maintain an action against the employer on behalf of its members to proscribe discriminatory practices dispose of the issue. This right is granted pursuant to statutory authority.

part and denied in part.<sup>5</sup> The grievance procedure promulgated by the Highway Commission is unconstitutional to the extent the union is prohibited from forwarding a step two written complaint prepared by the employee to an employer representative. The grievance procedure is constitutional insofar as the union is prohibited from being present at every step of the procedure. As Watson and Hughes were not given the benefit of a constitutional grievance procedure, the Highway Commission is directed to receive a step two written complaint from the union on behalf of Watson and Hughes filed within twenty days from the entry of this order. The Highway Commission is further directed to consider their grievances anew in accordance with the grievance procedure.

An order will be entered accordingly.

GERALD W. HEANEY  
United States District Judge  
Sitting by Designation

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<sup>5</sup> Defendants' affirmative defense that the plaintiffs have failed to exhaust their state administrative remedies provided by the grievance procedure has no merit. A plaintiff is not required to first seek redress in a state forum if a remedy under the Civil Rights Act is available. *Prieser v. Rodriguez*, 411 U.S. 475, 477 (1973).

Although for purposes of these motions the defendants do not take issue with Local 1315's contention that it has standing to sue, the Court concludes that Local 1315 does have standing. See *Arkansas Ed. Ass'n v. Board of Ed., Portland, Ark. Sch. Dist.*, 446 F.2d 763, 766 (8th Cir. 1971); *United Federation of Postal Clerks, AFL-CIO v. Watson*, 409 F.2d 462, 469-470 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969); *Smith v. Board of Education of Morrilton Sch. Dist. No. 32*, 365 F.2d 770, 776-778 (8th Cir. 1966).



**APPENDIX IV**

**JUDGMENT**

(Filed in U.S. District Court January 23, 1978)

Plaintiffs' motion for summary judgment on Count I of the complaint is granted in part as the grievance procedure promulgated by the Arkansas State Highway Commission on May 23, 1973, is unconstitutional insofar as it prohibits Arkansas State Highway Employees Local 1315 from forwarding a step two written complaint prepared by the employee to an authorized employee representative; and denied in part.

Defendants' motion for summary judgment on Count I of the complaint is granted in part as the remaining portions of the grievance procedure at issue are constitutional, and insofar as Arkansas State Highway Employees Local 1315 is prohibited from being present at every step of the grievance procedure; and denied in part.

The Arkansas State Highway Commission is directed to receive step two written complaints from Arkansas State Highway Employees Local 1315 on behalf of Robert Watson and W. E. Hughes filed within twenty days from the entry of this order.

After receipt of the complaints, the Arkansas State Highway Commission is further directed to reconsider the grievances of Robert Watson and W. E. Hughes in accordance with the grievance procedure promulgated on May 23, 1973.

DATED this 23rd day of January, 1978.

AT THE DIRECTION OF THE COURT  
W. H. McCLELLAN, CLERK  
By SUZANNE L. THOMPSON  
Deputy Clerk



**MAR 27 1979**

**MICHAEL RODAK, JR., CLERK**

IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1978

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No. 78-1223

---

MAURICE SMITH, LAWRENCE BLACKWELL, J. C. PATTERSON, GEORGE KELL, Individually and as Commissioners of the Arkansas State Highway Commission; and HENRY GRAY, Individually and as Director of the Arkansas State Highway Department,  
Petitioners,

v.

ARKANSAS STATE HIGHWAY EMPLOYEES LOCAL 1315, JAMES P. ROWELL, ROBERT C. CONLEY, JACK FRANKS, EDWIN SHINN, SPENCER Y. LAND, WALTER MAYS, ROBERT WATSON and A. D. TATE,  
Respondents.

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**BRIEF FOR RESPONDENTS IN OPPOSITION**

---

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Little Rock, Arkansas 72201  
Attorney for Respondents





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## IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1978

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No. 78-1223

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MAURICE SMITH, LAWRENCE BLACKWELL, J. C. PATTERSON, GEORGE  
KELL, Individually and as Commissioners of the Arkansas State Highway  
Commission; and HENRY GRAY, Individually and as Director of the  
Arkansas State Highway Department,  
Petitioners,

v.

ARKANSAS STATE HIGHWAY EMPLOYEES LOCAL 1315, JAMES P. ROWELL,  
ROBERT C. CONLEY, JACK FRANKS, EDWIN SHINN, SPENCER Y.  
LAND, WALTER MAYS, ROBERT WATSON and A. D. TATE,  
Respondents.

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### BRIEF FOR RESPONDENTS IN OPPOSITION

#### QUESTIONS PRESENTED

1. Did the appellate court err when it affirmed the trial court's finding and conclusion that the grievance procedure promulgated by the Arkansas State Highway Commission was unconstitutional in that it prohibited the union from filing and processing a step 2 written grievance prepared by the aggrieved employee to the appropriate employer representative of that commission?



2. Is respondents' attorney entitled to a court awarded attorney's fee to be paid by petitioners for the preparation of this brief in opposition?

#### STATUTORY PROVISION INVOLVED

42 U.S.C. §1988

. . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

#### ARGUMENT: REASONS FOR DENYING THE WRIT

##### I. The Appellate Court Has Not Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court.

The appellate court affirmed the two critical findings made by the trial court regarding the right of public employees to join a union. Those lower courts specifically found that such a right encompassed the right of the union to file a grievance on behalf of its members and to assist in the presentation of that grievance, which right was one aspect of a public employee's right to petition government for the redress of grievances. In support of this proposition, the trial court with the approval of the appellate court relied on *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *Parsons v. Carmichael*, 82 L.R.R.M. 215 (E.D. Ark. 1972) and *City of Fort Smith v. Arkansas State Council No. 38, AFSCME, AFL-CIO*, 245 Ark. 409, 433 S.W. 2d 153 (1968).

The backdrop of relevant law is that in Arkansas a union can sue and be sued. *Thomas v. Dean*, 245 Ark. 446, 432 S.W. 2d 771 (1968). And public employees have a right to organize and become members of a union. *Potts v. Hay*, 229 Ark. 830, 315 S.W. 2d 826 (1958). Although it is not mandatory that a public employer bargain collectively with a union, the law in Arkansas is clear that a union can process grievances on behalf of public employees with their public employers. *City of Fort Smith v. Arkansas State Council No. 38 AFSCME, AFL-CIO*, *supra*.

In the *Brotherhood of Railroad Trainmen* case, the Brotherhood established a legal department throughout the United



States which recommended to its members and their families the names of lawyers to represent them in railroad personal injury litigation. The Supreme Court of Appeals of Virginia affirmed a trial court's injunction enjoining the Brotherhood from implementing such a procedure in the State of Virginia. This Court reversed that decision and stated:

It cannot be seriously doubted that the First Amendment's guarantees of free speech, *petition* and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of the Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.

*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, supra* at 5-6 (Emphasis added). In the *United Mine Workers* case, the union employed a salaried licensed attorney to represent many of its members who wished to retain him to represent them in workers compensation cases. The trial court found that the union's employment of such an attorney constituted the unauthorized practice of law and enjoined the union from employing an attorney on a salary or retainer basis to represent its members in workers compensation cases and any and all other claims which they may have under the law

of Illinois. The Illinois Supreme Court affirmed the decision of the trial court, but this Court reversed and held in pertinent part:

. . . We hold that the freedom of speech, assembly and *petition* guaranteed by the First and Fourteenth Amendments give petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable". The First Amendment would, however, be a hollow promise, if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.

. . .

. . . "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."

*United Mine Workers of America, District 12 v. Illinois State Bar Association, supra* at 221-223 (Emphasis added) (Cita-



tions omitted). By parity of reasoning, Robert Watson and W. E. Hughes could request the union to file and process a written grievance on their behalf to the appropriate employer representative of the Arkansas State Highway Commission. If it violates a union's First Amendment right to petition for the redress of grievances for its members to prohibit it from supplying legal aid to them, *a fortiori* petitioners have violated that right of the union by promulgating a grievance procedure prohibiting it from filing and processing a step 2 written grievance prepared by the aggrieved employee to the appropriate employer representative.

In a case before Judge J. Smith Henley, now a member of the Eighth Circuit, Bill S. Clark, one of the attorneys of record for the petitioners in this case, conceded:

Both sides recognize that Arkansas municipal employees have the right under Amendment 34 and Act 101 of 1947 to join a labor union, and that the city would have no lawful right to discharge them merely for joining the union involved here or for "union activities". Both sides also seem to be in agreement with the proposition that while plaintiffs had a right to join the union and to use the union as an agent for the presentation of grievances, the City was not required to bargain collectively with the Union and that generally municipal employees have no right to strike against their employer.

*Parsons v. Carmichael*, *supra* at 2514. In the *City of Fort Smith* case, the Arkansas Supreme Court stated:

During the oral argument, counsel for the appellees, envisaging the possibility that the city might not be compelled to bargain collectively, suggested that nevertheless the union's right to present its grievances to city officials ought to be recognized. No doubt that right does exist. The Bill of Rights protects the rights of the people to assemble and

to petition the government by address or remonstrance. Ark. Const. Art. 2, §4. . . .

*City of Fort Smith v. Arkansas State Council No. 38 AFSCME, AFL-CIO*, *supra* at 245 Ark. 414, 433 S.W.2d 156. Clearly, the trial and appellate courts' critical findings listed above are supported by record evidence and legal precedent. See also Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service*, 22 Sw L.J. 585, 591-592 (1968). Clearly, when petitioners refused to allow the union to file and process the grievances of Robert Watson and W. E. Hughes it violated the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

Petitioners' prime contention is that, if the appellate court's decision is allowed to stand, it will require the petitioners to recognize and bargain collectively with the union. This contention does not withstand scrutiny. Petitioners promulgated a grievance procedure which allows representatives of the union to represent Arkansas State Highway Department employees at its second step. Assuming *arguendo*, and without conceding the point, that the grievance procedure as promulgated by petitioners is constitutional, it allows a representative of the union to represent an employee of the Arkansas State Highway Department at step 2. Petitioners cannot contend that such representation by the union at step 2 of the grievance procedure requires it to recognize and bargain collectively with the union. If such representation by the union does not require the petitioners to recognize and bargain collectively with the union, how does the additive of allowing the union to process and forward a step 2 written complaint preferred by the employee to the appropriate employer representative transform the grievance procedure into a mandate that petitioners recognize and bargain collectively with the union? The answer is obvious—it does not. Petitioners have promulgated a grievance procedure, which minimally recognizes the First Amendment right of the union



to petition government for the redress of grievances of its members by allowing the union to represent its members at the step 2 level. But that grievance procedure was intended to curtail the union's effectiveness in representing its members and presenting their grievances to the appropriate employer representative. It works to the detriment of a member of the union. As an example, the member may have a grievance but may not know how to properly write it out to delineate the issue and/or dispute with the Arkansas State Highway Department. If the grievance is inartfully drafted by one of the union's members, the union may not be able to properly represent that member at step 2. In such a circumstance, the member's right to join a public union and to have that union represent him or her is emasculated. The appellate court's decision assures to employees of the Arkansas State Highway Department that their right to membership in the union is not passive but does include the right to have the union affirmatively represent him or her in the drafting and presentation of their grievance to their employer. It would appear that it would be to petitioners' interest to have its employees satisfied with their working conditions, and, if they are not, to provide them with a viable mechanism to vent their dissatisfaction. A bona fide grievance procedure is such a mechanism and often is therapeutic. As Justice William O. Douglas stated:

. . . The agreement is to submit all grievances to arbitration, not merely those the court would deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware.

*United Steelworkers of America v. American Manufacturing Company*, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed. 2d 1403 (1960). By allowing the union to process and forward a written grievance prepared by the aggrieved employee to the appropriate employer representative and to represent that aggrieved employee at step 2, petitioners' interest appears to be

well served. It must be assumed that the grievance procedure was promulgated by petitioners in good faith. This must mean that, if an employee has a grievance, petitioners must want that grievance adjusted. This is going to have a therapeutic effect on the employee and to make that employee a better worker for the Arkansas State Highway Department.

When petitioners promulgated the challenged grievance procedure, it recognized the distinction between allowing employees to process a grievance and bargaining collectively with the union. The challenged grievance procedure does not amount to collective bargaining between petitioners and the union, but really amounts to a full disclosure procedure for both the aggrieved employee and the employer. The grievance procedure allows the employee, with the assistance of the union at step 2, to insure that all of the facts from the employee's standpoint are made available to the appropriate employer representative. After the employer representative obtains all of the facts and available evidence from the employee, he or she makes further investigation into the matter. Once that investigation is completed the employer representative makes a written report to the Director of the Arkansas State Highway Commission, who analyzes that report and ultimately makes a decision, which is final and binding. There is no bargaining whatsoever, and the grievance procedure is merely a conduit of allowing the employee, with assistance from the union, to ultimately get his or her view of the dispute to the director for his ultimate decision. The fact that the union, under the decision of the appellate court, files and forwards a step 2 written complaint prepared by the aggrieved employee does not transform the grievance procedure into a collective bargaining mechanism between the union and petitioners. Clearly, in the extant case, the appellate court did not decide an important question of federal law but just applied well crystalized legal principles to the simple facts before it. The petitioners' contention that the appellate court decided an important question of federal law is frivolous and must be rejected.



## **II. The Decision of the Appellate Court Does Not Conflict With the Decision of the United States Court of Appeals for the Seventh Circuit.**

Petitioners contend that the decision in the extant case conflicts with *Hanover Township Federation of Teachers Local 1954, AFL-CIO v. Hanover Community School Corporation*, 457 F.2d 456 (7th Cir. 1972). In *Hanover*, the local union was attempting to bargain collectively with the school board but the latter refused to engage in meaningful bargaining with the union. During those negotiations, the school board mailed employment contracts to individual teachers requesting them to sign and return them within three days. In ruling that there was no constitutional duty to bargain collectively with a union, the Seventh Circuit stated:

For purposes of decision we may therefore, assume that the procedure followed by defendants in mailing individual contracts to union members while collective bargaining discussions were in progress would have been an unfair labor practice if the Labor-Management Relations Act were applicable, and that this procedure tended to undermine the economic strength of the union. It may also have deprived the teachers of benefits they sought to obtain by exercising their First Amendment rights. That amendment, however, provides no guarantee that a speech will persuade or that advocacy will be effective. Since the coverage of the relevant parts of the Civil Rights Act is no broader than the constitutional protection, those statutes are not equivalent to the Labor-Management Relations Act in the field of public employment. The district court correctly relied on our holding in *Indianapolis Education Assn. v. Lewallen* that “. . . there is no constitutional duty to bargain collectively with an exclusive bargaining agent.”

*Id.* at 461. *Hanover* stands for the proposition that 42 U.S.C. §1983 does not amount to a “baby” National Labor Relations

Act for public employees. In the extant case, respondents are not contending that petitioners have perpetrated an unfair labor practice by bargaining in bad faith but are contending that they violated the right of the union to file a written grievance on behalf of its members and to assist them in making a presentation of that grievance in violation of the First Amendment.

The *City of Charlotte* case did not involve the right of a union to file a grievance on behalf of its members and to assist them in the presentation of that grievance. That case stands for the proposition that a public employer may promulgate reasonable standards to justify its refusal to check-off union dues without violating the equal protection clause of the Fourteenth Amendment. The Supreme Court found that the City of Charlotte had established reasonable criteria based on cost to justify its refusal to check-off union dues. *City of Charlotte v. Local 660, International Association of Firefighters*, 426 U.S. 283 (1976). That case does not conflict with the extant case. To conclude, there is no conflict between the extant case and the *Hanover* and *City of Charlotte* cases.

## **III. The Attorney for the Respondents is Entitled to a Court Awarded Attorney's Fee to Be Paid by Petitioners.**

The undersigned attorney did not receive a fee from the union for the services he performed for it before the trial and appellate courts, although the Eighth Circuit awarded a \$300.00 fee. Additionally, although the union is going to pay for the printing of this brief, it is not going to be able to pay the undersigned attorney a fee for writing this brief. Therefore, in the circumstances of this case, the Court is requested to order petitioners to pay the undersigned attorney a reasonable attorney's fee. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, provides that the Court in its discretion may award an attorney's fee to the prevailing party in cases involving violations



of 42 U.S.C. §1983. This act was signed by President Ford on October 19, 1976 and its legislative history and judicial interpretation establish that its application is retroactive to all pending cases. *Hutto v. Furney*, 57 L.Ed. 2d 522 (1978), *Commonwealth of Pennsylvania v. O'Neill*, 431 F.Supp. 700 (E.D.Pa. 1977) and *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977). If the court decides to award the undersigned an attorney's fee to be paid by petitioners the undersigned will be most happy to submit an affidavit to the Court detailing the time spent briefing this case to this Court.

#### CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

JOHN T. LAVEY  
1735 Tower Building  
Little Rock, Arkansas 72201  
Attorney for Respondents

#### Certificate of Service

I hereby certify that I have on this . . . . day of March, 1979, served copies of the foregoing Brief for Respondents in Opposition by depositing them prepaid in the U.S. Mail on Mr. Bill S. Clark, Attorney at Law, 2000 First National Bank Building, Little Rock, Arkansas 72201, and on Mr. Thomas B. Keys, Attorney at Law, Arkansas State Highway Department, 9500 New Benton Highway, Little Rock, Arkansas 72209.

JOHN T. LAVEY